Thesis

In this paper I aim to critique Rawls’ theory of justice as fairness ultimately on two subsequent grounds, both of which center on his notion of public reason. First, I criticize the merely post hoc and ad hoc stipulation that there is a fact of so-called reasonable pluralism, in which the notion of public reason is grounded. I argue that this problem can be emended by subsuming justice as fairness mutatis mutandis into a natural law theory. Second, I argue that while this move has a significantly beneficial effect on Rawls’ theory of justice, the notion of public reason should be made less restrictive on Rawlsian grounds. The effect of this second argument is to afford more space and integrity to religion, and other comprehensive doctrines, in the public arena. Justice as Fairness is absolved of the charge that it, otherwise, significantly undermines the self-esteem of conscientious religious citizens. Thus, in sum, public reason needs to be (re)defined, and, I argue, should be less restricted.

Introduction

John Rawls, who is no doubt one of the greatest political theorists of the last hundred years, presents a coherent and almost compelling theory of justice which aims to justify, and establish as a normative prescription of reason,¹ the political liberalism which best accords with western constitutional democratic society. This social contract theory he calls ‘justice as fairness.’ In many ways his argumentative procedure is familiar to natural law theorists, as he begins by making basic suppositions, for instance concerning the lexicographical priority of the principle of liberty over other principles like equality, and then intends to derive, in deductive fashion, a whole theory of justice. Where his view departs from the family of natural law theories, and where I intend to locate my first constructive criticism, is that he does not begin by stipulating properly basic² presumptions which act as the necessary and sufficient conditions of reasonableness. A brief exposition of the account is necessary in order to elucidate discussion, and clearly situate the criticism.

Rawls begins by introducing an artifact of reason which he calls ‘the original position’, a place occupied by an ideal, perfectly rational, self-interested,³ mutually dis-interested (Theory, 12). agency who must reason from behind a ‘veil of ignorance’ (Theory, 11) which hides certain facts from them which, had they knowledge of them, would cause undesirable bias in their deliberations. Thus, for example, certain historical contingencies, or facts about natural or social endowments (such as whether one is intelligent, beautiful, rich, male or female, et cetera) simply are not available to be taken into account by the denizen of this original position, and this ensures their impartiality. The idea is then to discover principles to which everyone would agree in this original position, at least if they were all rational in a sense which “must be interpreted as far as possible in the narrow sense, standard in economic theory, of taking the most effective means to given ends” (Theory, 12). Since “the principles of justice are to be conceived as those that free and rational persons concerned to further their own interests would agree should govern their forms of

¹ There are problems with the way this word is used in the theory, which will come to play.
² I adopt here the expression, which has come to enjoy customary usage in epistemology, of ‘properly basic’ as referring to a belief which it is rational to accept even in the absence of arguments and evidence for it, and irrational to reject in the absence of a defeater, where by a ‘defeater’ I mean some other belief which seriously undermines the plausibility of the ‘properly basic’ belief. This expression comes originally, as far as I know, from Alvin Plantinga.
³ There are passages in Rawls’ work which indicate that he is aware of a problem with calling the person in the original position ‘self-interested’ “as these words are normally used” (JF, 85). This does not undermine the characterization I have offered necessarily, as there are passages where he seems to admit, in some sense, of a self-interested quality.
social life and institutions

Rawls stipulates that, in justice as fairness, this original position “corresponds to the state of nature in the traditional theory of the social contract” (Theory, 11). In fact, the original position can be seen as the see of the impartial judge from which the perfectly rational representative ‘man’ can issue ex cathedra declarations, not about faith or morals, but about political justice. Rawls thus intends to reason his way from certain basic suppositions to a political theory of justice, taking “the principles that would be chosen in the original position [as] the kernel of political morality” (Theory, 194).

Rawls goes on from there to stipulate that, “being rational, the persons in the original position recognize that they should consider the priority of these principles” (Theory, 37) chosen from the original position, since, otherwise, it is possible for principles to, given the occasion of circumstance, prescribe opposing courses of action. There is, as Rawls admits, some inevitable reliance on fundamental intuitions (Theory, §8), but this can be minimized by ordering, as far as can be done, the principles ‘rationally.’ For example, the denizen of the original position, because they are mutually disinterested, and because they are rational in the sense formerly stipulated, will believe in a lexicographical priority of liberty over equality. Indeed, Rawls will insist that “liberty may only be limited for the sake of liberty,” as when one liberty is restricted so as to bring about a greater liberty for all. So the person in the original position serializes these principles into a hierarchical order.

Finally, the person in the original position is not altogether bereft of empirical knowledge. In fact, they presuppose certain empirical facts which Rawls collectively refers to as the circumstances of justice, which are supposed to be the “normal conditions under which human cooperation is both possible and necessary” (Theory, 109). These include relatively innocuous presuppositions, such as the fact that “many individuals coexist together at the same time on a definite geographical territory” (Theory, 126), and a “condition of moderate scarcity” (Theory, 127) obtains which impels them, as rational agents, to commit to a social contract (i.e., commit to some scheme of social cooperation). However, making a distinction between the former facts, which he calls “objective circumstances” (JF, 84) of justice, and an index of general facts which he calls “the subjective circumstances of justice” (JF, 84), he goes on to stipulate facts of the latter kind. These facts, presupposed in the original position as part of the “normal conditions under which human cooperation is both possible and necessary” (Theory, 109), include in the first place a fact of reasonable pluralism (JF, 84).

This fact of reasonable pluralism is closely networked to a number of concepts in justice as fairness including the concept of ‘public reason,’ the ‘overlapping consensus’ and the concept of ‘comprehensive doctrines of the good.’ Under this last heading are included any views which are both systematic, and which include “nonpolitical values” (JF, 183), and so are not restricted to merely political considerations. Obviously, therefore, this will include religious world-views which “are particularly clear” examples, but it is by no means restricted to them; “various liberal philosophical doctrines, such as those of Kant and Mill,” (JF, 33) will also qualify. The person in the original position does not presuppose any one of these, but instead presupposes that these views

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5 Hart, "Rawls on Liberty and its Priority." 534.
are all reasonable insofar, at least, as they each give grounds upon which people can “affirm the political conception of justice” (JF, 32). This is possible, as Rawls notes, because “different premises can yield the same conclusion” (Theory, 340). This reasoning procedure is not indifferent to questions of religious freedom and diversity. Instead, since the denizens of this original position, standing behind the veil of ignorance, do not know what, if any, religion they will subscribe to, “the parties cannot [rationally] take risks by permitting a lesser liberty of conscience for minority religions, say, on the chance that the person each represents belongs to a majority or dominant religion and may, in that event, have an even greater liberty than that secured by equal liberty of conscience” (JF 105). The person in the original position, then, will be indifferently disposed to any or every comprehensive doctrine.

Rawls enumerates five facts which all rely “on certain general facts of political sociology and human psychology,”7 and “are especially important in justice as fairness,” (JF, 33) the first of which is “the fact of reasonable pluralism” (JF, 33) This ‘fact’ is that “the diversity of religious, philosophical, and moral doctrines found in modern democratic societies… is a permanent feature of the public culture of democracy” (JF, 33-34). Thus, “a diversity of conflicting and irreconcilable yet reasonable comprehensive doctrines” (JF, 34) exists or will inevitably come to exist, and Rawls could not be clearer when he confirms that, because this first fact is one of the circumstances of justice “a lack of unanimity is part of the [very] circumstances of justice” (Theory, 196). The second of these facts, relevantly related to the first, is “the fact of oppression;” (JF, 34) namely that “a continuing shared adherence to one comprehensive doctrine can be maintained only by the oppressive use of state power” (JF, 34). The third fact is that “an enduring and secure democratic regime… must be willingly and freely supported by at least a substantial majority of its politically active citizens” (JF, 34). The fourth fact Rawls includes is that “the political culture of a democratic society that has worked reasonably well over a considerable period of time normally contains… certain fundamental ideas from which it is possible to work up a political conception of justice suitable for a constitutional regime” (JF, 34-35). There is a fifth fact which Rawls includes in his list, but which he does not consider to be one of the circumstances of justice. The fifth general fact is “that many of our most important political judgments involving the basic political values are made subject to conditions such that it is highly unlikely that conscientious and fully reasonable persons… can exercise their powers of reason so that all arrive at the same conclusion” (JF, 36). In other words, there can be no reasonable expectation for fully reasonable people of good will to arrive at a unanimous agreement with respect to important political judgments. To speculate about why this fifth fact is not included in the circumstances of justice is above my pay grade, but it is also, fortunately, of no consequence to my arguments; it is only the first four facts, though, are part of the circumstances of justice.

The key inter-defining terms at play, whose definitions I want to call into question, are (i) this fact of reasonable pluralism, (ii) the overlapping consensus, and (iii) public reason. First, Rawls notes, as we saw, that it is a presupposition of justice as fairness that there is a fact of reasonable pluralism, such that in a democratic environment, which is to say, an environment in which are “secured the basic rights and liberties of free institutions” (JF, 34), there is, among other normal circumstances, a fact of pluralism. Presuming this pluralism, it seems that “the question of stability leads to the idea of an overlapping consensus on a political conception of justice” (JF, 181). If the pluralism embodied did not allow an overlapping consensus on a political conception

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of justice, then that pluralism wouldn’t be politically stable, and thus, presumably, wouldn’t normally endure. We can take this “reasonable overlapping consensus to serve as a public basis of justification” (JF, 37), and this is what Rawls refers to as public reason. This intersection of reasonable agreement will give us, it is supposed, “a freestanding political conception and not a comprehensive doctrine.”8 This freestanding political conception, whose foundation is the overlapping consensus, demarcates the limits of public reason, and “these “limits of public reason” apply to “citizens when they engage in political advocacy in the public forum,” or to citizens when they vote on fundamental matters.”9 Thus, public reason is the “public basis of justification” (JF, 89).

**First Criticism: Reasonable Doubts**

There are two major concerns I have with Rawls’ account. The first is that he has defined his terms such that the *reasonableness* of the pluralism which is taken to be a fact of sociological normativity akin to the probabilistic regularities discovered in the natural sciences, is gratuitously presumed. Why, indeed, can we not say of the pluralism which obtains under a democratic environment that it is an unreasonable one, or one which may or may not be reasonable? Perhaps it is because citizens are presumed to be, in general, free, equal, rational and reasonable. This simply pushes the question back one step, however, and bids us to ask in virtue of what a citizen is reasonable. Rawls is nowhere very clear about his notion of ‘reasonableness’ but seems to take it as an intuitive notion. However, his intuition that the pluralism which comes to exist in the atmosphere of western constitutional democratic societies is at least normally *reasonable* is an intuition that I do not share; nay, I do not know how to share it, because I do not know what he means by the term. Rawls’ presumption seems to be that if we were to roll back the clock on western civilization and let history run its course for another iteration, presuming at least that it develops in a democratic atmosphere, then the result would be ‘reasonable.’ Is it really so hard to imagine, though, that some iterations of this kind would result in an unreasonable overlapping consensus? What of a democratic society that agreed by overlapping consensus that marriage should be abolished and sexual services be institutionalized as a public good? That is clearly unreasonable, but I see no reason to think it unthinkable or even unlikely. We may be blind to our own brand of unreasonableness, thinking our views reasonable and flattering ourselves for a job well done in coming to them. Where, though, is the standard against which we are being measured?

Moreover, whence this confidence in the fact that there cannot normally be a reasonable monism in a democratic atmosphere? The reason why this monism can’t be reasonable for Rawls seems to be that it could only come about, given the second general fact, by means of the oppressive use (perhaps abuse) of state power. I note in passing that not only does Rawls never say that oppression is always and everywhere *unreasonable*, he affirms that “political power is always coercive” (JF, 90). The line between mere coercion and oppression, however, is nowhere clearly drawn, and it seems to be that only the former is “justifiable to all in terms of… public reason” (JF, 141). On this construal of ‘oppression’ it really would be impossible to have ‘reasonable’ monism, but this is granting Rawls too much. These facts seem *prima facie* (not to mention *a priori*) dubious to me, but I do not intend to bring these claims into contention on the basis of empirical arguments (for what empirical argument could there be for something’s being reasonable when we are left without a definition of the term). Instead, I mean to draw attention to

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the fact that there is no way to make Rawls’ claims of reasonableness even intelligible unless and until he has provided some minimal, perhaps even provisional, but clear and relevant definition of the term.

Rawls’ definition (or ‘use’) of ‘reasonable’ seems to be specially engineered to cast justice as fairness in a generous light, and as such this move on his part needs to be called into question. How might a natural law theory emend this semantically self-serving problem of characterizing a fact of pluralism as a fact of reasonable pluralism? There are of course many different kinds of natural law theories, very wide reaching in their characteristics and qualities, and even if some of these are considered practically paradigmatic, such as that of Thomas Aquinas, we need only, for our purposes, identify a necessary and sufficient condition in virtue of which a view can qualify as part of the family of natural law theories. Natural law theories characteristically identify ‘nature’ with the nature of man, the nature of man with his reason, and thus nature with reason. Natural law theories all begin, therefore, by carefully identifying some set of propositions to which all men by nature have access, and which are at least properly basic. These articles of reason, often called laws of nature, are then proposed to be the κανών of reasonableness. They are the measure against which views can be called reasonable or unreasonable. Let us say that this is a necessary and sufficient condition of a theory’s being one of natural law.

On this view Rawls can be granted everything he wants, questions of plausibility notwithstanding. He could stipulate that it is an essential dictate of practical reason that all people adopt a principle of toleration. If Rawls simply describes the content of public reason and takes it to be stipulated as foundational for practical reason then his view gains in plausibility what it loses in obscurity. On this view, of course, the reasonable pluralism will not be supposed (nor will it need to be supposed as a normal circumstance of justice) in ad hoc fashion. However, instead of stipulating a fact of reasonable pluralism to be presumed in the original position, given the nature of which a reasonable overlapping consensus also exists and defines a sphere of public reason, a natural law construal will work in reverse. First it will establish criteria of reasonableness (its necessary and sufficient conditions), and then it will determine whether there is an overlapping consensus in lieu of that, and thus (possibly) recognize a fact of reasonable pluralism, without precluding (necessarily) the possibility of a reasonable monism. Public reason can still act as the resource with which we are obliged, as conscientious citizens, to debate and dialogue with each other about jurisprudential and legislative matters.

Second Criticism: Religion in the Public Arena

Among the concerns expressed by Rawls’ critics is one in particular expressed by those in society who are both eager to be conscientious citizens, and yet who are sincerely, by intellectual conviction, religious. Thus it has been noted that “a major concern has been that Rawlsian liberalism is too "secular," too "exclusive," and not sufficiently "inclusive" of religious opinions and commitments.” It is against this “trivialization” or "bracketing" of religion that a number of thinkers including the likes of “Stephen Carter and the Catholic Michael Perry” have striven “for more inclusion of religion in law and politics, with implicit and sometimes explicit criticism.

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12 Griffin, 298.  
13 Griffin, 297.
of the Rawlsian framework.”\textsuperscript{14} As Michael J. Sandel has noted, Rawls’ view seems to prescribe that “in debating justice and rights, we should set aside our personal moral and religious convictions and argue from the standpoint of a ‘political conception of the person,’ independent of any particular loyalties, attachments, or conception of the good life,”\textsuperscript{15} which is impracticable.

In the real world of politics, the citizen is called upon to do more than merely think from within a framework of public reason, whose content may not adjudicate some matter definitively. In being called upon to register their vote on controversial matters such as same-sex marriage legislation, for example, citizens are effectively being called upon to draw on comprehensive doctrines of the good in order to vote conscientiously for the good of all. The same goes for all issues on which there is no overlapping consensus and on which the sum of all the principles of public reason does not suffice to adjudicate. On all such issues as these, citizens are obliged to follow their consciences which have been formed by doctrines at least more comprehensive than the freestanding political conception of justice. As an aside, if the former point is correct, then it seems to follow that citizens have a political (not just moral) duty to adopt or develop, insofar as it is possible for them, a comprehensive doctrine of the good. Thus, even on a Rawlsian liberal scheme it looks as though people in real life will have to avail themselves of more than any mere theory of political justice.

It is in light of such criticisms that “Rawls [has come to] changed his account of public reason, amending it to make public political discussion much more open to comprehensive doctrines, including specifically religious reasons.”\textsuperscript{16} He has thus added his now “famous ‘proviso’:”\textsuperscript{17}

\[R\]easonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, provided that in due course proper political reasons – and not reasons given solely by comprehensive doctrines – are presented that are sufficient to support whatever the comprehensive doctrines are said to support.\textsuperscript{18}

There remains a residual problem with this account of public reason, however. In effect, there is a subliminal trivialization of religion which actually puts into jeopardy, or worse violates, the self-esteem of those who are religious. Self-esteem, however, is considered, from the original position, to be a primary good which “it is always rational for them” (Theory, 156) to secure. To see how, suppose that two propositions P and Q are, although incompatible with each other, both strictly compatible with another proposition L. Now suppose that the conditional probability of P on L is greater than the conditional probability of Q on L; $\Pr(P|L) > \Pr(Q|L)$. In such a circumstance, P can be said to \textit{cohere} better with L than does Q. Take P and Q to represent two incompatible but reasonable comprehensive doctrines, and L to represent public reason; then Q is undermined by L with respect to P. However, that seems to entail that, given L, P is more reasonably accepted than Q (at least \textit{ceteris paribus}). Since the content of L is the quintessential commitment of the ideal citizen, citizens who believe in Q will recognize themselves to be less ideal citizens than those

\textsuperscript{14} Griffin, 297.
\textsuperscript{15} Hugh Baxter, 1341.
\textsuperscript{16} Hugh Baxter, 1341.
\textsuperscript{17} Hugh Baxter, 1341.
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who believe in P. In fact, the closer L is to the kernel of the doctrine propounded by P, and the closer it is to the periphery of Q, the more highlighted this tension between citizens will be.

The self-respect of a wide segment of the population is potentially undermined by this trivialization of religion. After all “our self-respect normally depends upon the respect of others [and] unless we feel that our endeavors are honored by them, it is difficult if not impossible for us to maintain the conviction that our ends are worth advancing” (Theory, 178). However, as Rawls points out, the problem is captured by a seminal question:

How is it possible for those affirming a religious doctrine that is based on religious authority, for example, the church or the Bible, also to hold a reasonable political conception that supports a just democratic regime? The point is that not all reasonable comprehensive doctrines are liberal comprehensive doctrines; so the question is whether they can still be compatible for the right reasons with a liberal political conception?

The religious person may feel that their pursuit of the public good, insofar as it is informed by a comprehensive doctrine which makes them a less ideal citizen, is undermined. This problem, however, may seem intractable. After all, arguments which appeal to comprehensive doctrines of the good, even if appealed to, cannot be reasonably expected to convince anybody who isn’t already sympathetic to that very same (or a sufficiently similar) comprehensive view. However, even among these comprehensive doctrines which all agree with the content of the overlapping consensus, which designates the intellectual public property of political discourse, some cohere better with the content of public reason than do others. A conscientious religious believer who wishes to be as ideal a citizen as she can will, if she is perceptive enough, recognize that insofar as her religious commitments ‘conflict’ with her political commitments she is a less ideal citizen than she otherwise would be.

I end with an ambitious submission that this problem can be solved with a relatively easy fix. Suppose, for the sake of argument and illustration, that citizens who resided together in a body politic characterized by an atmosphere of democratic culture had come, through the course of time, to win wide factions of society over to their cause, which is a comprehensive doctrine in harmony with the overlapping consensus. Suppose, for instance, that the majority of the members of that society were Cohen-ian socialists, Christians, or Kantians. In this hypothetical case we have a circumstance in which there is a fact of reasonable monism. Given such a fact, would it really be an obligation of justice to refrain from appealing to that comprehensive doctrine in public discourse, which aims only, after all, at the social welfare? It seems intuitively not. As society changes, therefore, the overlapping consensus may also change, and ‘public reason’ therewith (though not natural law therewith). Thus, if one simply rejected in principle the Rawlsian supposition that “comprehensive doctrines cannot provide the content of public reason” (PL, 134), the religious could feel as though their religious pursuits were in harmony with their political citizenship. They may hope, and strive earnestly and in good conscience for, the development of public reason beyond a merely political conception in a way they think will redound to the benefit of all. To recapitulate, I have tried to show that Rawls’ view predicates ‘reasonableness’ of sociological-historical facts, but that this predicate is entirely vacuous on his account, a problem easily fixed by an appeal to a natural law approach to ‘reason.’ Finally I have tried to suggest that there is a tension between comprehensive doctrines of the good and an unreasonably restrictive notion of public reason which can be ameliorated by allowing the overlapping consensus to take whatever shape it will within the boundaries of ‘reason’ as defined by natural law.